87-1638

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1988

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the district court's finding that at least some of the cocaine introduced at trial was not in closed containers was so clearly erroneous as to call for an exercise of this Court's supervisory powers?

II.

Whether the Court of Appeals should have conducted a de novo review of the district court's findings of fact that at least some of the cocaine introduced at trial was not in closed containers?

III.

Whether the Fourth Amendment to the United States Constitution permits the establishment of categories of "worthy" and "unworthy" containers?

IV.

Whether the initiation of a search by

a private party permits police officers to continue the search and to exceed the scope of the earlier private search without a search warrant?

V.

Whether advice by trial counsel to a criminal defendant to not participate at trial and to not permit any other counsel to conduct a defense constitutes ineffective assistance of counsel when the defendant follows that advice?

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TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Duane Wendall Larson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The order of the district court, (App. 7-31) was not reported. The opinion of the Court of Appeals (App. 1-6) is reported at 833 F. 2d 758 (8th Cir. 1987). The Court of Appeals denied rehearing on January 27, 1988 (App. 84).

JURISDICTION

The order of the Court of Appeals denying rehearing and rehearing en banc was entered on January 27, 1988. This petition has been filed within sixty days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The

Constitutional provisions relevant to this petition are the Fourth Amendment prohibition against unreasonable searches and seizures and the Sixth Amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

STATEMENT

1.) During the afternoon of October 28, 1983, a female approached the front desk at the Howard Johnson's Motel in Burnsville, Minnesota. She registered and paid for one night's lodging in room 124. The room registration noted that the room would be occupied by two persons, although the second occupant was not identified.

The following morning, the female who had rented the room went to the front desk and arranged for her companion to be able to stay until 2:00 p.m., two hours past the normal checkout time. Later that afternoon a

motel maid found the room still occupied. The male occupant advised that he would be staying over and did not wish maid service.

Later in the afternoon of October 29, 1983, a motel employee noticed that there were unpaid telephone charges from room 124. Assistant Manager William Webster sent a bellman to room 124 to determine whether the room was still occupied. The bellman reported that there were grocery bags and empty bottles in the room. Uncertain as to whether the room was still occupied, Webster went to the room and admitted himself with his pass key.

After entering the room, Webster observed two grocery bags, one of which contained two plastic bags of white powder. After returning to the room with the Assistant Manager of the motel's restaurant for a second look, Webster summoned the Burnsville police. By the time Webster and the police went to the room, it was again occupied by the Petitioner.

After a conversation outside the motel room door during which Petitioner offered to pay the room rent and advised that he would not consent to a search of the room, the police obtained consent to enter from the motel manager. A warrantless search of the bags seen earlier by the Assistant Manager, and other bags which had not previously been in the room ensued. During the course of this search, the police opened sealed manila envelopes inside the bags which had not been in the room earlier. As a result, Petitioner was arrested and charged with possession of cocaine with intent to distribute.

2.) Petitioner hired a defense team of four attorneys. One of the attorneys was hired as local counsel. Two attorneys from Chicago, Raymond Smith and Ellen Robinson, were hired to perform suppression and other pretrial work. Attorney Oscar Goodman of Las Vegas was hired to be lead counsel at trial.

The record from a pretrial suppression hearing (PT-___) and at trial (TT-___) showed the following.

After entering the room and opening all of the bags and the sealed manila envelopes within some of the bags, the police arrested Petitioner, who was still standing just outside the door to the room (PT-135, App. 96). A police report, page 3 of which is reproduced in the Appendix (App. 85-89) showing that most of the seized powders had been in sealed manila envelopes had been supplied to defense counsel prior to the hearing (ST-72, App. 92-93). According to one of the officers who had made the actual seizures, the manila envelopes were in turn inside grocery bags (PT-134, App. 94-95). The evidence was placed in an evidence locker at the police station over the weekend.

Despite being supplied with a police report and testimony at the pretrial suppression hearing indicating that at least

some of the powders seized were inside opaque containers, which were in turn inside other opaque containers, defense counsel did not pursue the container issue. Instead, counsel moved to suppress solely on the grounds that Petitioner had a continuing privacy interest in the motel room despite the fact that the rental period had expired. This argument was rejected by the district court and later by the Court of Appeals. United States v. Larson, 760 F. 2d 852 (8th Cir. 1985), cert denied 106 S. Ct. 143.

3.) Trial began on February 2,1984. Petitioner's trial counsel, Oscar Goodman, failed to appear at trial. Goodman sent telegrams to the district court and to local counsel advising that he was in trial in Las Vegas. Acting on advice received from Goodman by telephone, the Petitioner advised the district court that he would not permit his other counsel to represent him at trial.

Petitioner's remaining counsel advised the district court that he would continue to represent Petitioner on the suppression issue (TT-4, App. 97-98). Based on Petitioner's instructions, counsel did not otherwise participate at trial.

The record at trial showed that a total of eleven drug or drug related items were introduced, five of which actually contained cocaine. The exhibits were as follows. Exhibit number 1 contained five hundred grams of cocaine. Exhibit number 2 contained one hundred twenty-five grams of cocaine. Exhibit number 3 contained two hundred fifty grams of cocaine. Exhibit number 4 contained five hundred grams of cocaine (TT-526, App. 139-140). Exhibit number 9 contained ten grams of a substance containing cocaine (TT-533, App. 144-145).

Exhibit number 5 contained two thousand twenty-eight grams of mannitol. Exhibit number 6 contained two thousand three hundred

seventy-eight grams of lactose (TT-530, App. 142-143). Exhibit number 7 contained two hundred nineteen grams of mannitol. Exhibit number 8 was a plastic cup containing about six grams of mannitol residue (TT-531, App. 143-144). Exhibit number 10 was a sifting device containing no residue (TT-533, App. 144-145). Exhibit number 14 was a scale.

The seizures of the Exhibits containing drugs were described as follows. "Item number 1 came from the grocery bag that was on the sink in the bathroom." Asked how he recognized the envelope which was a part of Exhibit number 1, officer Holden responded "I marked the item with the case file and the date, the time and I also wrote my name on the bag for identification." Just so there is no confusion between the envelope in which Exhibit 1 was originally seized and the police evidence bag, it should be noted that Holden was asked if his name and the

case number appeared anywhere else on the Exhibit. He responded, "Yes, it does, it appears at the top of the outside sealed bag." (TT-339, App. 114-115).

Holden described Exhibit number 2 as: "Item number 2 was also contained in the grocery bag on the sink in the bathroom along with items number 1 and 3." (TT-340, App. 116). Asked to describe how Exhibit number 2 was packaged, Holden stated, "The powder was bagged inside the zip lock bags here as was item number 1. The bag was inside the manila envelope." Government counsel then asked, "So, there's a manila envelope also contained in Government Exhibit 2?". Holden responded, "Yes, there is.". Holden went on to explain that the zip lock bags inside the manila envelope were in turn inside another paper bag which was then inside the paper bag with Exhibits 1 and 3 (TT-341, App. 117-118).

Exhibit number 3 was in the same grocery

bag as Exhibits number 1 and 2. Exhibit number 3 was double zip lock bagged and was in turn inside a manila envelope (TT-343, App. 118-119).

Holden described Exhibit number 4 as being "in one plastic zip lock bag, then inside this other plastic zip lock bag, and then together they were inside this brown paper bag." Asked where Exhibit number 4 had been found, Holden responded, "That was recovered on the floor of the motel room under the television set in another larger grocery bag." (TT-344, 345, App. 119-122).

Exhibit number 9, the last Exhibit containing cocaine, was described by Holden as "The white powder was inside one of the plastic bags. The plastic bag, in turn, was placed inside the other plastic bag, and then both of these were inside the paper bag." (TT-351, App. 127-128). Sergeant Schlueter gave a similar description of Exhibit number 9 (TT-373, 374, App. 137-138).

Other Exhibits were also seized from inside of containers.

Exhibit number 10, the sifter, was "found inside a plastic bag, which was in turn inside this paper bag." (TT-374, App. 137-138).

Finally, Exhibit number 14, the scale, "was inside the container, which was in turn inside another larger grocery bag." (TT-357, App. 130-131). Sergeant Schlueter confirmed this description (TT-369, App. 131-132).

In contrast to the Exhibits containing cocaine, and some of the other Exhibits, which were clearly in one or more opaque containers, Exhibits 5, 6, 7 and 8 were not so concealed. Exhibit number 5, which contained two thousand twenty-eight grams of mannitol, was "located on the bed in the motel room." (TT-347, App. 124-125). This fact was confirmed by Sergeant Schlueter (TT-371, App. 133-134). Exhibits 6, 7 and 8, which were, respectively, lactose, mannitol,

and a plastic cup, were "found once again on the bed in a Super Valu bag." (TT-348, App. 125-126). This was confirmed by Sergeant Schlueter, who added that "the top was open..." (TT-372, 373, App. 134-137). No description of opaque containers was given in regard to Exhibits 5, 6, 7 and 8.

Despite the fact that defense counsel was confronted at trial with overwhelming evidence that all cocaine introduced at trial had been found in warrantless searches of closed containers, counsel continued to urge suppression solely on the basis that Petitioner had continued to have a reasonable expectation of privacy in the motel room after the rental period had expired. Petitioner was convicted and sentenced to ten years imprisonment. The conviction was affirmed on appeal. United States v. Larson, supra, 760 F. 2d 852.

4.) After arriving at F.C.I., Sandstone,

Petitioner learned that under the clearly established law of this Court, a warrant is required to search closed containers. United States v. Chadwick, 433 U. S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977); Arkansas v. Sanders, 442 U. S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). As a result, Petitioner filed a motion to vacate sentence pursuant to Title 28 U.S.C. §2255 alleging ineffective assistance of counsel due to counsel's failure to raise the container search issue. Petitioner also alleged that counsel was ineffective as a result of attorney Goodman's advice not to let other counsel represent Petitioner at trial.

5.) The district court ordered the government to respond. Surprisingly, the government did not even attempt to dispute the contention that all drugs introduced at trial were the fruits of warrantless searches of closed containers. Rather, the government

argued waiver because Petitioner had not raised the container issue before or at trial. Therefore, according to the government, Petitioner was barred from raising the issue in a motion pursuant to §2255. Alternatively, the government sought to rely on the Manager's consent to search the room as justification for a search of Petitioner's containers. The government did concede that if attorney Goodman had advised Petitioner not to allow other counsel to defend him at trial, "Goodman should be disbarred for unconscionably unethical practice."

6.) The magistrate appears to have agreed with Petitioner that the cocaine was in closed containers. "If attorney Smith was unaware until midway through trial that the cocaine was concealed inside sealed envelopes, his ignorance can only be attributed to Larson's failure to inform him of that fact." (Report and Recommendation at 21, App.

65-67). - The magistrate concluded that Petitioner's failure to tell counsel that the cocaine was in containers relieved counsel of the obligation to raise the container search issue (Report and Recommendation at 22, App. 67-68). The magistrate also concluded that this Court's decision in Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3039, 49 L. Ed. 2d 1067 (1976) effectively overruled Kaufman v. United States, 394 U. S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1068 (1969) and that as a result federal prisoners could no longer raise Fourth Amendment issues under §2255 if they had been afforded a full and fair opportunity to litigate those claims at trial. (Report and Recommendation at 4-12, App. 38-52).

Alternatively, the magistrate found that the container issue was merely a variation of the claim of a continued right to privacy in the motel room which was raised at trial and on direct appeal because all

suppression issues are claims for the same relief. The magistrate therefore concluded that the failure to raise the claim at trial constituted an intentional bypass of an available remedy and thus constituted waiver. (Report and Recommendation at 12-14, App. 52-56). The magistrate accepted, for purposes of the §2255 motion, Petitioner's assertion that attorney Goodman advised Petitioner not to let other counsel defend him at trial and declined to make a finding as to prejudice at trial because the district court was in a better position to make that assessment. (Report and Recommendation at 17-20, App. 59-65).

7.) Petitioner filed a timely objection to the Report and Recommendation. It is difficult to say precisely how much of the Report and Recommendation the district court adopted. The district court found itself "in basic agreement with the Magistrate on most

issues." (Order at 3, App. 10-11).

In perhaps its most critical, and least explained finding, the district court held that "at least some of the cocaine was in plain view rather than in closed and opaque containers. See supra, note 3." (Order at 7, App. 18-19). Note 3 (Order at 5, App. 14) states "The trial testimony revealed that when the hotel manager looked into the grocery bags, he saw plastic bags inside, filled with white powder. Not all the plastic bags were in manila envelopes and the tops of some of the grocery bags were open. Pretrial (P.T.) (Vol.) I: 62-3, 134. Trial Transcript (T.T.) II: 307-8, 312, 336, 351, 373."

The district court appears to have adopted the magistrate's finding that Stone v. Powell, supra, overrules Kaufman v. United States, supra, thereby prohibiting a federal prisoner from raising Fourth Amendment issues on collateral attack where there has been a full and fair opportunity to raise

them at trial. However, the district court's ultimate findings do not rest on that ruling. (Order at 5-6, App. 15-18).

Also accepting for purposes of the §2255 motion Petitioner's assertion that attorney Goodman had advised Petitioner not to permit other counsel to defend him at trial, the district court found that Petitioner had waived that issue becaue the district court had warned Petitioner of the danger of following that course of action. (Order at 7-11, App. 18-26).

8.) On appeal, the government once again declined to dispute Petitioner's contention that all of the cocaine introduced at trial was taken from closed containers. The Eighth Circuit Court of Appeals disposed of the case in a brief per curiam opinion. Accepting the district court's finding that at least some of the cocaine was in plain view without any apparent independent review

of that issue, the Court of Appeals went on to add a new element. It found, with no apparent support in the record, that the police search had been merely a follow up to the earlier private search. The Court of Appeals therefore concluded that Petitioner's underlying evidentiary claim was without merit. Apparently as an alternative holding, relying on United States v. Mefford, 658 F. 2d 588, 591-92 (8th Cir. 1981), the Court of Appeals held that there was no reasonable expectation of privacy in a paper bag that was not stapled, taped or tied shut. The Court of Appeals found that counsel's failure to raise the container issue did not constitute ineffective assistance of counsel. (Slip opinion at 2, App. 3-5). The Court of Appeals did not discuss the fact that in order to find the cocaine, the police had to open the sealed manila envelopes which were inside the grocery bags.

Addressing the issue of attorney Good-

man's advice not to let other counsel defend him at trial did not constitute ineffective assistance of counsel because of the overwhelming evidence and the fact that the district court had warned Petitioner about the dangers of not utilizing standby counsel (Slip opinion at 5, App. 5). Having found no prejudice because of its acceptance of the district court's factual finding, the Court of Appeals did not address the issues of waiver or whether Stone v. Powell, supra, overrules Kaufman v. United States.

JURISDICTION BELOW

The district court's jurisdiction was based on Title 28 USC, §2255. The Court of Appeals' juriscition was based on Title 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

1.) THE DISTRICT COURT'S FACTUAL FINDING THAT AT LEAST SOME OF THE COCAINE USED TO CONVICT PETITIONER WAS NOT IN CLOSED

CONTAINERS IS SO CLEARLY ERRONEOUS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

This Court should grant review of the first question presented, dealing with the issue of whether the district court's factual finding that at least some cocaine was in plain sight was clearly erroneous, because the record is so overwhelmingly clear that all cocaine introduced at trial was taken from closed containers that the result in this case to date comes within the provisions of Supreme Court Rule 17.1(a), which calls for review of cases which have "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

As Petitioner has clearly demonstrated in the statement of facts, the record conclusively proves that Exhibits 1, 2, 3, 4 and 9, the only Exhibits containing cocaine,

were seized during warrantless searches of closed containers. As shown below, the district court's finding that at least some cocaine was in plain view is the result of the district court's confusion and failure to distinguish between cocaine and non-narcotic white powder. The Court of Appeals' failure to conduct its own review of the record has perpetuated that error and has resulted in a miscarriage of justice.

The district court's finding that "at least some of the cocaine was in plain view rather than in closed and opaque containers. See supra, note 3." (Order at 7, App. 18-20) relies on certain specified pages of the record: PT-62-3 (App. 90-92); PT-134 (App. 94-95); TT307-08 (App. 99-101); TT-312 (App. 104-105); TT-336 (App. 113-114); TT-351 (App. 127-128); and, TT-373 (App. 136-137).

An examination of the cited references shows the following. PT-62-63 (App. 90-92) involves testimony by the Assistant Manager

William Webster that he looked into two grocery bags, and that the first contained empty liquor bottles and the second contained white powder in clear plastic bags. Webster did not testify that he had seen cocaine, most likely because "I wouldn't recognize illegal narcotics if I saw them." (TT-63, App. 91-92). Nor did Webster mention manila envelopes or the plastic bags being inside smaller paper bags, as testified to by the officers regarding each Exhibit containing cocaine.

PT-134 (App. 94-95) involves testimony by officer Holden that "Several of the paper bags (earlier described as grocery bags) contained plastic bags or envelopes inside the paper bags, and there was various white powders inside of the plastic bags." This is, of course, the same officer Holden whose much more detailed, Exhibit by Exhibit, trial testimony is set forth in the statement of facts. That testimony makes it

quite clear that each and every Exhibit containing cocaine was in one or more opaque containers and was then in turn inside a larger grocery bag, which is itself an opaque container.

TT-307-08 (App. 99-101) is the trial testimony of Assistant Manager William Webster. As he did in the pretrial hearing, Webster testified that he had looked into two, and only two, grocery bags. The first contained empty liquor bottles and the second contained a clear plastic bag of white powder which "laid flat in the shopping bag, maybe an inch or inch and a half tall." and "The bag was full of it.". At TT-312, Webster went on to explain that when he returned with Mary Jo Kraft, the Assistant Manager of the motel's restaurant, he removed the clear plastic bag he had seen earlier from its grocery bag and discovered "there was more than one plastic bag in the grocery bag." The second plastic bag was "almost exactly

the same." Asked if he saw anything else in the room, Webster replied "No." (TT-318, App. 106-107). Neither Webster nor Mary Jo Kraft mentioned double or triple zip lock bags or manila envelopes. Webster stated that both bags were full. Exhibits number 5 and 6 contained over two thousand grams each (TT-530, App. 142-143). Both were single bagged. Exhibits 1 and 4 each contained only five hundred grams and Exhibits 2 and 3 contained only one hundred twenty-five and two hundred fifty grams respectively (TT-526-527, App. 139-141).

TT-336 (App. 113-114) is testimony by officer Holden that "there were three plastic bags inside a grocery bag in the bathroom. Webster had seen only cough drops in the bathroom. (TT-309, App. 102-103). The testimony is obviously a generalized discussion of Exhibits 1, 2 and 3 which was greatly amplified in Holden's later testimony at TT-339-341 (App. 114-118), which

clearly shows that those Exhibits were in opaque containers.

TT-351 (App. 127-128) is also officer Holden's testimony. It references Exhibit number 9 in terms of plastic bags. However, as shown in Holden's testimony on that very page and in Sergeant Schlueter's testimony (TT-373-74, App. 136-138), the plastic bags were inside a paper bag.

As TT-372 (App. 134-135) makes clear, the reference at TT-373 (App. 136-137) to an open grocery bag with clear plastic bags in it is to the non-cocaine Exhibits, numbers 6, 7 and 8. The record here is exceedingly clear. All cocaine introduced into evidence was seized in warrantless searches of closed containers. The district court's finding to the contrary is clearly erroneous. The Court of Appeals' obvious failure to conduct its own review of the record has deprived Petitioner of an effective habeas remedy. This Court should order the government to

finally take a position as to whether the cocaine introduced into evidence was taken from closed containers. Depending on the government's response, the Court should then either review the record or remand to the Court of Appeals in light of the government's admission.

2.) BECAUSE OF THE HISTORICAL IMPORTANCE OF THE WRIT OF HABEAS CORPUS IN RELEASING PRISONERS FROM ILLEGAL CONFINEMENT, APPELLATE REVIEW OF HABEAS CORPUS PROCEEDINGS SHOULD BE DE NOVO.

Petitioner fully expected to be required to meet the burden of demonstrating in the Court of Appeals that the district court's factual findings were clearly erroneous. Petitioner met that burden with the same clear evidence from the record that has been set forth in this petition. However, it is obvious from the brief per curiam opinion of the Court of Appeals that it merely accepted the district court's factual finding at face value rather than

conducting its own examination of the record. "The district court found some of the seized drugs in the grocery bags were in plain view and some were obtained during a police search that followed a private search conducted by the ownder of the premises. Thus the search of the bags challenged by Larson was not invalid under the fourth amendment." (Slip opinion at 2, App. 3).

While an unsuccessful habeas litigant certainly should expect to have to show on appeal that the factual findings of a district court were clearly erroneous, there should at least be a review by the Court of Appeals of challenged findings of fact. This is particularly true of habeas corpus proceedings because of the historical function of what this Court has often termed "The Great Writ" in releasing prisoners from illegal confinement. In this case, no review of the challenged factual findings was made. They were accepted at face value by the

Court of Appeals. Such summary, per curiam dispositions have no place in habeas corpus proceedings, particularly where Constitutional issues are involved. Commissioner of Internal Revenue v. McCoy, 484 U. S. ___, 98 L. Ed. 2d 2, 8, 108 S. Ct. ___ (1987) (dissenting from denial of certiorari).

At least one Circuit has found the appropriate standard for review of habeas corpus proceedings to be de novo. Kim v. Villalobos, 799 F. 2d 1317, 1319 (9th Cir. 1986). It does not appear that the Eighth Circuit has an announced or required standard of review for habeas corpus cases. There should be such an established standard for review of habeas corpus in order to insure protection of its important function in our system of justice. This Court should set that standard as de novo review.

3.) THE COURT OF APPEALS' OPINION MUST BE REVERSED BECAUSE THE CONSTITUTION DOES NOT SANCTION THE ESTABLISHMENT OF

CLASSES OF "WORTHY" OR "UNWORTHY" CONTAINERS.

Relying on an Eighth Circuit case which was submitted to the panel just prior to this Court's decision in Robbins v. California, 453 U. S. 420, 69 L. Ed. 2d 744, 101 S. Ct. 2841 (1981), the Court of Appeals held that grocery bags are a Constitutionally unworthy container. (Slip opinion at ?, App. 3-4). It is doubtful that the case relied on, United States v. Mefford, 658 F. 2d 588, 591-92 (8th Cir. 1981), was good law even when it was announced. Since that time several decisions of this Court and other Circuits have cast considerable doubt on the validity of Mefford.

Mefford was released on September 8, 1981. On July 1, 1981, after Mefford was argued, this Court decided Robbins v. California, supra. While it is true that Robbins was soon overruled by New York v. Belton, 453 U. S. 454, 69 L. Ed. 2d 768, 101 S. Ct.

2861 (1981), Belton rested on the premise that there was no principled reason to require police officers to obtain a search warrant for containers found within a vehicle where they had probable cause to make a search of the vehicle itself. Belton did not in any way alter that portion of Robbins which found that a Constitutional distinction between "worthy" and "unworthy" containers was not permissible.

Since Mefford, a number of other cases have found any container which conceals its contents to be "worthy" of Fourth Amendment protection. "One point on which the Court was in virtual unanimous agreement in Robbins was that a constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve into a series of cases in which paper bags, locked trunks, lunch buckets and orange crates were placed on one side of the line or the other, the

central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantee of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or a knotted scarf claim equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case." United States v. Ross, 456 U. S. 798, 72 L. Ed. 2d 572, 592, 102 S. Ct. 2157 (1982) (emphasis added). "What one person may put into a ~~suitcase~~, another may put into a paper bag." Robbins v. California, supra, (emphasis added).

The Eighth Circuit's opinion here is in clear conflict not only with earlier decisions of this Court, but also with the Ninth Circuit's interpretation of United States v. Chadwick, supra, and Arkansas v. Sanders,

supra. In United States v. Salazar, 805 F. 2d 1394, 1398 (9th Cir. 1986), the Ninth Circuit found that those cases and United States v. Ross, supra, compelled the conclusion that a closed paper bag, even though not stapled or tied, enjoyed the same protection as any other container.

Similarly, in United States v. Owens, 782 F. 2d 146, 149-50 (10th Cir. 1986), a case remarkably similar to the present case, the Tenth Circuit held that the police could seize: "marijuana cigarettes, white powder and drug paraphernalia (that) were in plain view" but that "Even if Pebbletree had a legal right to evict [the defendant] in order to clear his room for the next occupants, neither it nor the police had any right to search his luggage or the other closed containers." because "Owens had a reasonable expectation of privacy ...in the contents of the closed bag inside the dresser drawer." United States v. Owens, supra, 786 F. 2d at

149-50.

The case for Constitutional protection is even more compelling where, as here, the police not only opened paper bags, but the sealed manila envelopes as well. For reasons which are not apparent from the Eighth Circuit's opinion, it saw no need to address the separate issue of the sealed manila envelopes.

There does not appear to be any principled reason why the paper bags in issue here, much less the sealed envelopes, are any less entitled to the protection of the Fourth Amendment than the suitcase in Sanders or the trunk in Chadwick. This concept of the Constitutional right of privacy in any container which conceals its contents has been reaffirmed in Texas v. Brown, 460 U. S. 730, 75 L. Ed. 2d 502, 519, 103 S. Ct. 1535 (1983) and Arizona v. Hicks, ___ U. S. ___, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

Because the Court of Appeals decision in this case is in conflict with prior decisions of this Court and with those of at least two other Circuits, the Court should grant certiorari as to the third question presented. Any other course will leave the law of container searches in the Eighth Circuit in conflict with the law of this Court and the rest of the country.

4.) THE COURT OF APPEALS' OPINION IMPERMISSIBLY PERMITS SUBSTANTIAL POLICE EXPANSION OF PRIVATE SEARCHES AND IS THEREFORE CLEARLY IN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

Without in anyway explaining its reasoning, the Court of Appeals found that the police conduct in issue here was permissible because it did no more than follow up on the earlier private search by the motel employees.

Once again, the record is quite clear. Assistant Manager Webster looked into two grocery bags which were on a table in the

bedroom portion of the motel room. One of those bags contained empty liquor bottles and one contained two clear plastic bags of white powder. (PT-62-63, App. 90-92). Webster again looked into the grocery bag with the clear plastic bags of white powder when he returned to the room with Mary Jo Kraft, the Assistant Manager of the motel's restaurant. Neither Webster nor Kraft ever mentioned seeing smaller bags or manila envelopes in the bag containing the clear plastic bags of white powder. When asked if he had seen anything other than the two bags he had looked into in the room, Webster replied "No.". (TT-311-312, App. 103-105).

Webster did not look into any other bags because on his first two trips to the motel room, without the police, he did not see any other bags in the room. He had particularly noted there was nothing else in the room except some cough drops on the

counter in the bathroom. (TT-309, App. 102-103). However, when he entered the room with the police, there were additional bags in the room. (TT-318, App. 106-107). The police helped themselves to all the bags in the room. (TT-319,107-108). They found the scale (Exhibit #14) inside a black plastic case inside a grocery bag which had not been in the room when Webster had been there earlier. (TT-320, App. 108-109); TT-356-357 (App. 128-131).

That the police went far beyond the search of the two bags examined by Webster is further demonstrated by the testimony of officer Holden. He located Exhibits 1, 2 and 3 in a grocery bag in the bathroom. (TT-336, App. 113-114), an area Webster had specifically noted contained only cough drops. (TT-309, App. 102-103). Unlike the clear plastic bags seen by Webster and Kraft, the plastic bags found in the bathroom area were in turn inside manila envel-

opes, which were in turn inside the grocery bag. (TT-340-343, App. 115-119). Exhibit number 4 was also located by Holden. Unlike the otherwise unconcealed plastic bags seen by Webster, Exhibit number 4 was not only in a grocery bag, it was also inside a smaller brown paper bag within the grocery bag underneath the television set. (TT344-345, App. 119-122). Webster had not examined any bags under the television set. Exhibit number 9 was contained in two zip lock bags and was then in turn inside a paper bag under the television set. (TT-351, App. 127-128; TT-373-374, App. 136-138).

This Court's controlling case on private searches is United States v. Jacobsen, 466 U. S. 109, 113-115, 104 S. Ct. 1652, 80 L. Ed. 2d 285 (1984). The rule of Jacobsen is quite clear. While the police may avail themselves of what has been given to them by a private party, they may not exceed the scope of the private search without a warrant.

See United States v. Jacobsen, supra, 80 L. Ed. 2d at 98, n. 17. "We reject Justice White's suggestion that this case is indistinguishable from one in which the police simply learn from a private party that a container contains contraband, seize it from its owner and conduct a warrantless search, which as Justice White properly observes would be unconstitutional." In this case, the police not only exceeded the scope of Webster's earlier search, but at the time of the police search and seizure the containers were no longer under the control of the motel employees. Petitioner had by then returned to the room and the containers were clearly under his dominion and control.

In this case, the record is not only conclusive that the police searched a number of bags not previously examined by Webster or Kraft, it also shows that even the bags examined earlier by motel personnel

were, by the time the police arrived, no longer even remotely under the control of the motel employees, they were taken from Petitioner.

This expansion of the earlier private search cannot be regarded as harmless. As the record clearly demonstrates, it was only after the police had exceeded the scope of the earlier private search that they began finding the cocaine which was ultimately used to convict the Petitioner.

Because the Court of Appeals' opinion clearly sanctions an unprecedented police expansion of an earlier private search, it is in conflict with the controlling decision of this Court. For that reason, this Court should grant certiorari on Petitioner's fourth question.

5.) ADVICE BY COUNSEL WHO CANNOT APPEAR AT TRIAL THAT A CRIMINAL DEFENDANT SHOULD NOT LET OTHER COUNSEL DEFEND HIM IS SO EGREGIOUSLY INEFFECTIVE THAT A CRIMINAL DEFENDANT WHO FOLLOW THAT ADVICE HAS

BEEN DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals found that given the overwhelming evidence at trial, and the fact that the district court had warned Petitioner of the dangers of following attorney Goodman's advice, Petitioner could show no prejudice from not participating at trial and not letting standby counsel defend him. (Slip opinion at 3, App. 4-5). This ruling raises two significant issues under the circumstances of this case. The first is whether, in a situation in which the defendant is totally unrepresented at trial, the appropriate standard is that found in Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) or that found in United States v. Cronic, 466 U. S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (9184). The difference, of course, is that while Strickland requires a showing of actual prejudice, Cronic presumes prejudice where there has been a fundamental breakdown

in the adversarial process or where counsel has been prevented from assisting his client during a critical stage of the proceedings. The second crucial issue implicit in the Court of Appeals' finding is whether a criminal defendant who relies on and follows the advice of counsel waives a Constitutional right when he relies on the egregiously ineffective advice of counsel instead of the contrary advice of the district court.

Petitioner alleged, and the district court accepted as true, that when the district court denied a continuance in order to permit attorney Goodman to try the case, Goodman advised Petitioner not to let other counsel defend Petitioner at trial because if Petitioner was convicted, a new trial would be ordered by the Court of Appeals and Goodman would defend Petitioner at the new trial. As a result, other than attorney Smith's objections to the introduction of evidence on the same grounds which had been

denied in the pretrial suppression motion, Petitioner was completely unrepresented at trial.

In finding no demonstrable prejudice, the Court of Appeals obviously applied the Strickland standard rather than the Cronic standard. Under either Strickland or Cronic, a defendant must show that counsel's advice or conduct fell below an objectively reasonable standard for counsel practicing criminal law.

There can be little doubt that in this case attorney Goodman's advice to forego representation at trial because doing so would result in a new trial was far below any objective standard of reasonableness. By the time the advice was given, in early 1984, it had long since been established that district courts have broad discretion in granting or denying continuances and that the district court's ruling will only be reversed for abuse of discretion. Morris v.

Slappy, 461 U. S. 1, 103 S.Ct. 1610, 1616, 75 L. Ed. 2d 610 (9183); Ungaru v. Sarafite, 376 U. S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (9164).

The facts in this case were such that there was absolutely no chance that a denial of a continuance would result in reversal. As the Court of Appeals found on direct appeal, counsel had been notified of the trial date well in advance. The request for a continuance was made only two days before trial was scheduled to start. The Court of Appeals found that the circumstances demonstrated a lack of diligence by defense counsel. United States v. Larson, supra, 760 F. 2d at 856-57. Counsel's advice was, therefore, completely outside the standard of objectively reasonable advice required of counsel in criminal cases. The government described the situation here well. Counsel who would advise a client to forego his one chance of presenting a defense on the repres-

entation that a new trial would result has engaged in unethical conduct.

It is at the second stage of inquiry that Strickland and Cronic diverge. Where the claim of ineffective assistance involves counsel's specific performance or non-performance, the defendant must make a showing of specific prejudice. Strickland, supra, 466 U. S. at 686. However, where counsel is absent or is prevented from assisting the defendant during a critical stage of the proceedings, or fails to subject the prosecution's case to adversarial testing, then prejudice is presumed. Cronic, supra, 466 U. S. at 659.

In this case, the Cronic standard is clearly the appropriate one. As a direct result of counsel's advice, Petitioner was totally unrepresented at trial. Any greater breakdown in the adversarial process is hard to imagine. That breakdown occurred as the direct result of Petitioner's reliance on

the advice of his retained counsel.

The district court and the Court of Appeals appear to have held that because the district court advised Petitioner of the danger of following counsel's advice, Petitioner waived the right of effective assistance of counsel. Such a finding implicitly holds that a criminal defendant is bound to follow the advice of a trial court rather than counsel's advice when there is a conflict.

The proposition that a criminal defendant should disregard the advice of counsel and follow the advice of the district court is unsupported by any case law of which Petitioner is aware. Courts, no matter how well intentioned, are not partisan advocates. In other contexts, this Court has recognized the inherent reasonableness of a client following his counsel's advice. United States v. Boyle, 469 U. S. 241, 259, 83 L. Ed. 2d 622, 631, 105 S. Ct. 687 (1985). Petit-

ioner's reliance on the advice of counsel should, therefore, not be construed to be a waiver of the right to effective assistance of counsel.

Even if this case were to be judged on the Strickland standard, with its requirement of a showing of prejudice, this Court should find that Petitioner was denied effective assistance of counsel by virtue of the fact that counsel's advice not to permit other counsel to conduct a defense at trial. The record discussed in the statement of facts clearly shows that the evidence used to convict Petitioner was seized in warrantless searches of closed containers. Had counsel been actively participating at trial, it is highly probable that this fact would have become even more obvious than it already was and suppression of the critical evidence would have been ordered when the proper motion was made, bringing about a different result.

At the very least, had the subject of the manner in which the seizures were made been more fully explored on the record by virtue of counsel's participation in proper cross examination, the district court's reliance on the one sided government presentation of evidence at trial would not now be the basis for the district court's clearly erroneous factual finding that not all of the cocaine introduced at trial was taken in warrantless searches of closed containers.

Because the Court of Appeals applied the wrong standard to Petitioner's claim of ineffective assistance and because the Court of Appeals overlooked the ovvious prejudice on the issue of suppression because it did not conduct its own review of the record, this Court should grant certiorari on Petitioner's fifth question.

CONCLUSION

The district court's finding that at

at least some of the cocaine introduced at trial was in plain sight is so clearly erroneous and the failure of the Court of Appeals to correct that error so far sanctions a departure from the usual and accepted course of judicial proceedings that they require an exercise of this Court's supervisory power.

In order to prevent such occurrences in the future and to insure meaningful review of habeas corpus proceedings, this Court should find that de novo review is required in habeas corpus cases.

The Court of Appeals' establishment of "worthy" and "unworthy" classes of containers is not sanctioned by the Fourth Amendment and is in conflict with the settled law of this Court and that of other Circuits. The same is true of the Court of Appeals' finding that once private persons have begun a search, the police may not only proceed but may greatly expand the scope of the

earlier private search.

Counsel's advice not to permit other attorneys to defend Petitioner at trial was so egregious as to call for application of the Cronic standard rather than the Strickland standard, and in any case Petitioner has shown actual prejudice.

For all of the above reasons, this Court should grant certiorari to review this case.

DATED this _____ day of March, 1988.

Respectfully submitted,

/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for Writ of Certiorari, together with Appendices, on counsel for the oppsoing party by depositing same in the United States mail, with postage prepaid, addressed to:

Office of the Solicitor General
United States Department of Justice
Washington, D. C. 20530

DATED this _____ day of March, 1988.

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